**Ferndale Foods, Inc. *and* United Food and Commercial Workers Union, Local 44, AFL–CIO.** Case 19–CA–28279

August 21, 2003

DECISION AND ORDER

BY MEMBERS SCHAUMBER, WALSH, AND ACOSTA

The General Counsel seeks a default judgment[1] in this case on the ground that the Respondent failed to file an answer to the complaint. Upon a charge filed by United Food and Commercial Workers Union, Local 44, AFL-CIO (the Union) on October 24, 2002, the General Counsel issued a complaint on January 28, 2003,[2] against Ferndale Foods, Inc. (the Respondent) alleging that it violated Section 8(a)(1) and (3) of the Act. The Respondent failed to file an answer.

On March 7, Counsel for the General Counsel filed a Motion for Summary Judgment with the Board. On March 10, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. Thereafter, the Respondent filed a response opposing the granting of the General Counsel's motion, to which the General Counsel filed a reply.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint itself states that unless an answer is filed within 14 days, the Board may find that the allegations in the complaint are true. In this case, the complaint and notice of hearing issued on January 28, alleging that the Respondent unlawfully discharged employee Antonio Angulo. The Respondent neither filed an answer nor requested an extension of time to do so.[3]

Counsel for the General Counsel, by letter dated February 19 and sent by certified mail, first-class mail, and facsimile transmission, notified the Respondent that it had not received a timely answer to the complaint and that the time for filing an answer would be extended to March 5. The letter further stated that, if Respondent failed to file an answer by that date, counsel for the General Counsel would file a Motion for Summary Judgment.

On March 7, no response to her letter having been received, counsel for the General Counsel filed a Motion for Summary Judgment. Counsel for the General Counsel attached a copy of the complaint and her February 19 letter, and proof that the facsimile transmission of the letter had been received and that the certified mail copy of the letter had been signed for, on February 20, by "J.G. Eacott." On March 10, the Board issued its Notice to Show Cause.

By letter received by the Board on March 26, the Respondent opposed the motion. In that letter, the Respondent asserted that it never received either mailed copy of counsel for the General Counsel's February 19 letter. It essentially admitted, however, receiving the facsmile transmission of the letter. With respect to the copy of the letter sent certified mail, the Respondent claimed that "Graham Eacott" was not an employee of the Respondent, and that he had signed for the letter at the post office as a favor to the Respondent's owner, Margaret Kent. The Respondent further asserted that Eacott "did not realize that the letter had any legal implications," and that the letter never reached the attention of a responsible official at the Respondent prior to the March 5 deadline.

Counsel for the General Counsel filed a reply to the Respondent's opposition. Counsel asserted that all correspondence from her to the Respondent had been mailed to the address furnished to counsel by the Respondent, and that the facsimile transmission had been sent to the telephone number previously used by the Respondent in communicating with counsel and appearing on the Respondent's letterhead stationery. In addition, counsel for the General Counsel asserted and furnished proof that "J.G. Eacott" had previously signed documents on behalf of the Respondent. Indeed, counsel furnished proof that Eacott had signed the certified mail receipt for the complaint in this case, which the Respondent never denied receiving.

Based on the evidence that counsel for the General Counsel has presented, we find that the Respondent received the complaint and the February 19 letter, which gave the Respondent additional time in which to respond to the complaint. Nevertheless, and despite the General Counsel's repeated warnings, the Respondent failed to

[1] Because counsel for the General Counsel requests judgment on the ground that the Respondent has failed to file an answer, we construe the motion as a request for default judgment.

[2] All dates are in 2003, unless otherwise noted.

[3] The complaint stated that the hearing would commence on March 18 in Bellingham, Washington. On February 6, the Respondent requested a 120-day extension of the hearing date, assertedly to allow it adequate time for financial restructuring. The Respondent also claimed that it could not afford to hire an attorney, and that it could not afford to pay backpay or offer reinstatement to the terminated employee. On February 13, the Acting Regional Director denied the request for a continuance.

file an answer at any time.[4] Accordingly, on this record and in the absence of good cause shown for the failure to file an answer, we grant the General Counsel's motion.

Our dissenting colleague raises or refers to the same arguments that the Board fully considered and rejected in *Patrician Assisted Living Facility*, 339 NLRB 1153 (2003). We reject them again here, for the reasons set out in *Patrician*. Thus, we do not reach our colleague's assessment of the Respondent's assertions in the context of his analytical framework that the Board rejected in *Patrician*.

On the entire record, the Board makes the following

## FINDINGS OF FACT

### I. JURISDICTION

At all material times, Respondent Ferndale Foods, Inc, a Washington corporation, with an office and place in business in Ferndale, Washington, has been engaged in the business of operating a slaughter and meat processing facility. During the 12-month period preceding the issuance of the complaint, a representative period, the Respondent, in the course and conduct of its business operations, has sold and shipped goods or provided services from its facilities within the State of Washington, to customers outside that State, or sold and shipped goods or provided services to customers within the State of Washington, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value in excess of $50,000. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act and that United Food and Commercial Workers Union, Local 44, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

### II. UNFAIR LABOR PRACTICE

On September 18, 2002, the Respondent discharged employee Antonio Angulo because he joined and assisted the Union and engaged in concerted activities and to discourage employees from engaging in these activities. Respondent therefore violated Section 8(a)(1) and (3) of the Act by discharging Angulo.

[4] In her written statement accompanying the March 26 letter, Respondent's owner Kent asserted that on September 18, 2002, the Respondent discharged an employee for "food safety related issues and absenteeism. Violation of food safety practices is not condoned at this facility and is taken very seriously." Although Kent did not refer to the employee by name, we assume that she was referring to Angulo, whom the complaint alleged was discharged on that date. Nevertheless, we decline to accept Kent's statement as an answer to the complaint. Even when a respondent is representing itself pro se, an attempt to answer complaint allegations in a response to a Notice to Show Cause is untimely and will not defeat a Motion for Default Judgment. See, e.g., *Kenco Electric & Signs*, 325 NLRB 1118 (1998).

## CONCLUSIONS OF LAW

By the acts and conduct described above, the Respondent has violated Section 8(a)(1) and (3) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[5] Specifically, having found that the Respondent has unlawfully discharged employee Antonio Angulo, we shall order the Respondent to offer him immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings suffered as a result of the discrimination against him, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall also order that the Respondent remove from its records all references to Antonio Angulo's unlawful discharge and notify him in writing that this has been done.

## ORDER

The National Labor Relations Board orders that the Respondent, Ferndale Foods, Inc., Ferndale, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees because they joined and assisted United Food and Commercial Workers Union, Local 44, AFL–CIO and engaged in concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Antonio Angulo immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Antonio Angulo whole for any loss of earnings and other benefits suffered as a result of the dis-

[5] At the General Counsel's request, we have provided for a Spanish language translation of the Board's notice.

crimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to Antonio Angulo's unlawful discharge, and within 3 days thereafter, notify him in writing that this has been done and that his unlawful discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place to be designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Ferndale, Washington copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be translated into Spanish and both Spanish and English notices shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in this proceeding, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 18, 2002.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER SCHAUMBER, dissenting.

Contrary to my colleagues, I would deny the General Counsel's Motion for Default Summary Judgment. In my view, the Respondent has established "good cause" for its failing to file a timely answer to the complaint. The majority's strict construction of the "good cause" requirement in Section 102.20 of the Board's Rules and Regulations is inconsistent with the construction given that same term by the federal courts, lacks a sound policy basis[1] and poses an undue risk of injustice.

FACTS

On January 28, 2003,[2] the General Counsel issued a complaint alleging, inter alia, that Respondent operates a slaughter and meat processing facility in Ferndale, Washington. The complaint further alleges that Respondent violated Section 8(a)(1) and (3) of the Act by terminating employee Antonio Angulo. After Respondent failed to answer the complaint, the General Counsel, on March 7, filed a Motion for Default Judgment with the Board.

On March 26, John Smrke, "Owners Agent," who is admittedly not an attorney, filed a letter on Respondent's behalf "vigorously oppos[ing]" the General Counsel's motion. A signed statement from Respondent's owner, Margaret Kent, accompanied Smrke's opposition letter.

Owner Kent avers that "On November 13, 2003 [sic] I was forced to shut the facility down on short notice. A cattle supplier utilizing the USDA Packers and Stockyards Act forced me to immediately liquidate my inventory to pay for cattle processed at my facility. . . ." Smrke states in his opposition letter that, by the end of November 2002, "all food inventory had been removed from the freezers and *all* employees were laid off." [emphasis in original] Smrke also states that Kent has been spending considerable time away from the office working on alternative business and financing arrangements as she attempts to reopen the facility.[3]

Regarding the failure to file an answer, Owner Kent claims the General Counsel's letter setting March 5 as the deadline for filing an answer "did not reach Mr. Smrke's attention prior to the deadline. This is because Mr. Smrke was not in the office and Mr. Eacott who picked up the mail that day did not realize that the letter had any legal implications."[4] Smrke's opposition letter notes that two Board agents visited Respondent's facility on February 27, and they failed to mention the deadline for filing an answer. Smrke claims that, during the agents' visit, he rejected the Board agents' settlement proposals and specifically informed them that Respon-

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] See, e.g., *NLRB v. The Washington Star Co.*,, 732 F.2d 974 (D.C. Cir. 1984), and *NLRB v. Central Mercidita, Inc.*, 273 F.2d 370 (1st Cir. 1959) (circuit courts refused to defer to the Board's harsh application of its deadlines for filing exceptions to decisions of administrative law judges).

[2] All dates are in 2003, unless otherwise noted.

[3] There is no assertion, however, that the Respondent has filed for bankruptcy.

[4] Smrke's letter states that Graham Eacott, who purportedly is not an employee, picked up mail at Respondent's post office box and signed for General Counsel's letter as a favor to Kent.

dent would be proceeding with the scheduled hearing on March 18.

On the merits, Owner Kent asserts in her signed statement that "[o]n September 18, 2002, an employee was terminated by my Human Resources Manager for food safety related issues and absenteeism. Violation of food safety practices is not condoned at this facility and is taken very seriously." Although Kent does not mention the discriminatee by name, September 18, 2002, is the date on which the complaint alleges that Angulo's discharged occurred.

Analysis

Section 102.20 of the Board's Rules and Regulations permits a late answer upon a showing of "good "'cause." While the majority's grant of default judgment in this case is consistent with Board precedent interpreting the "good cause" proviso**,** in my dissenting opinion in *Patrician Assisted Living Facility*, 339 NLRB 1153 (2003), I express my criticism of this precedent because it is "inconsistent with Section 102.121, which provides that the Board's rules and regulations 'shall be liberally construed'; with the Board's own stated policy preference for decisions on the merits; and . . . with the literal meaning of Section 102.20 itself."[5] My criticism does not stand alone. In an analogous case, *NLRB v. Washington Star*, supra at fn. 1, which involved the late filing of exceptions, the D.C. Circuit declined to defer to the Board's application of its filing deadline in part because the Board failed to articulate policy reasons for so narrowly interpreting its "good cause" requirement, an interpretation which is at odds with the federal courts' interpretation of "good cause" under the federal rules.

Now then, for reasons fully explained in *Patrician*, I believe the Board should apply to default judgment proceedings the same "good cause" standard used by the federal courts in deciding whether to set aside an entry of default. "In applying that standard, three factors typically will be material: the reason or reasons the answer was untimely, the merits of the respondent's defense,[6] and whether any party would suffer prejudice were the default set aside. Where appropriate, however, my analysis will take into consideration other relevant factors 'in a practical, commonsense manner, without rigid adherence to, or undue reliance upon, a mechanical formula.'"[7]

The first factor is the reason or reasons the answer was untimely. Here, the Respondent is unrepresented by counsel and did not fully appreciate the draconian consequences of missing an answering deadline in Board proceedings. This is not surprising for a pro se litigant. Moreover, the Respondent contends that it has cooperated fully with the Region during investigation of allegations against it and that Board agents visiting its facility in late February discussed settlement of this case and failed to communicate the consequences of not answering the complaint even after the Respondent stated that it would appear at the scheduled hearing. These circumstances, and the vigor with which the Respondent now contests the allegations against it, make it plain that the default was not willful.

Turning next to the merits of the Respondent's defense, Owner Kent has claimed in her signed statement that she terminated an employee on September 18, 2002 "for food safety related issues and absenteeism." Although Kent does not mention the alleged discriminatee by name, I agree with the majority that she was referring to Angulo. Kent's representations, if credited, would compel dismissal of the 8(a)(1) and (3) allegations against the Respondent. Therefore, I find that the Respondent has presented a facially meritorious defense.

Finally, with regard to the third factor, the issue is not one of mere delay, but rather its accompanying dangers that include the loss of evidence and the enhanced opportunity for fraud or collusion. There is no showing in this case that relevant evidence has been lost or that the General Counsel's witnesses have become unavailable. And

[5] Sec. 102.20 provides that if no answer is filed the allegations of the complaint will be deemed to be admitted as true "unless good cause to the contrary is shown." Thus, the determination as to whether "good cause" exists necessarily encompasses not only the reason(s) why no answer was filed (or why it was filed late) but also whether respondent has a meritorious defense and whether the nonmoving party will suffer any prejudice if the delayed answer is accepted for filing. However, unlike the Federal courts, the Board refuses even to consider any other factor unless it is satisfied with the reason the answer was late. Moreover, the Board has rejected myriad reasons for untimeliness, and has accepted few reasons, further narrowing its construction of the "good cause" proviso to the point of virtually eliminating it. See *Patrician*, 339 NLRB at 1154.

[6] Ideally, a late-answering respondent will set forth the merits of its defense in its response to the Notice to Show Cause, or in an affidavit attached thereto, as Respondent here has done. However, it would be both unrealistic and unfair to insist on such a showing in every case. Nothing in the Board's applicable controlling precedent or in the boilerplate language of its Notice to Show Cause puts a late-answering respondent on notice of the need to explain its defense, as opposed to simply admitting or denying the several allegations of the complaint without further comment. By contrast, an abundance of precedent puts a Federal-court defendant on notice that it must set forth the merits of its defense in order to obtain relief from a default. Accordingly, unless and until controlling Board precedent furnishes similar notice to late-answering respondents in Board cases, and the Notice to Show Cause is revised accordingly, I will overlook a respondent's failure to explain the merits of its defense in its response to the Notice to Show Cause where other relevant factors favor denying the Motion for Default Judgment.

[7] *Patrician*, 339 NLRB at 1159, quoting *KPS & Associates, Inc. v. Designs by FMC, Inc.*, 318 F.3d 1, 12 (1st Cir. 2003).

there is no showing that the alleged discriminatee Angulo will suffer prejudice by delay. Indeed, assuming the General Counsel proves the alleged unlawful discharge, the Respondent's cessation of operations has fixed the backpay period and Angulo would not be deprived of any immediate reinstatement opportunity by litigating this matter.

Based on the foregoing, I would deny the General Counsel's Motion for Default Judgment. I believe that, in these circumstances, such an approach is consistent with our rules and fosters responsible labor relations.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against our employees because they joined and assisted United Food and Commercial Workers Union, Local 44, AFL–CIO and engaged in concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Antonio Angulo immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Antonio Angulo whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

WE WILL remove from our files any reference to Antonio Angulo's unlawful discharge and notify him in writing that this has been done and that our unlawful action will not be used against him in any way.

FERNDALE FOODS, INC.